STATE OF MICHIGAN

COURT OF APPEALS

JOANNE OESTERLE,

Plaintiff-Appellee,

v

VILLAGE OF CHELSEA and CHELSEA DOWNTOWN DEVELOPMENT AUTHORITY,

Defendants-Appellants.

UNPUBLISHED
April 29, 2004

No. 244484
Washtenaw Circuit Court
LC No. 01-001228-CK

Before: O'Connell, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Plaintiff brought an action requesting an injunction, and alleging breach of contract and breach of a warranty deed for property purchased from defendant Chelsea Downtown Development Authority (hereinafter "DDA"). Defendants moved for summary disposition under MCR 2.116(C)(10). The trial court denied defendants' motion and instead granted plaintiff's request for summary disposition under MCR 2.116(I)(2). Defendants appeal as of right. We affirm.

This case concerns the sale of commercial property at 115 West Middle Street by the DDA to plaintiff and her now deceased husband. In the agreement and the deed there was the following language describing the grant from the DDA to plaintiff:

> Lot 60, Block 4, Original Plat of the Village of Chelsea, except the West 7.0 feet thereof in width and except the South 44.0 feet in width, and granting an easement for ingress and egress over the South 44.0 feet of said Lot 60 and Lot 59, Block 4**,** Original Plat of the Village of Chelsea for the purposes of ingress and egress to Middle Street, through the public parking established thereon, for automobiles, trucks, or other vehicles, and **granting the existing curb cut on Middle Street for similar ingress and egress purposes, which shall remain open and not blocked by the parking of vehicles on Middle Street**. [Emphasis added].

Defendant DDA conveyed the property to plaintiff and her husband on September 6, 1991 for $52,000. After the sale of the property, the Village of Chelsea (hereinafter "Village") enforced a no-parking area in front of plaintiff's business for ten years. In 1992, the Village changed the curb-cut as part of a streetscape project, thereby making it more difficult for plaintiff to access the building. Defendants' representative spoke with plaintiff and her husband before

the change in the curb-cut, and plaintiff and her husband indicated that they would purchase ramps to be able to continue to access the front of the building over the new curb, which they did. On two separate occasions, in 1993 and March 2001, the Village attempted to place parking spaces in the spots, but after complaints from plaintiff and examination of the deed, the Village continued the no parking area until November 2001, when it established the area three-hour parking, which resulted in the present suit.

Defendants moved for summary disposition under MCR 2.116(C)(8) and MCR 2.116 (C)(10), with one of the grounds being that the language of the easement unambiguously favored defendants' interpretation that the easement was limited to the curb-cut only. Plaintiff responded that if the language of the easement was unambiguous, it was unambiguous in her favor. Plaintiff then requested that the trial court find in her favor under MCR 2.116(I)(2).

The trial court decided in favor of plaintiff, finding the language in the easement to be unambiguously in favor of plaintiff's position that defendants promised plaintiff ingress and egress, which included no parking in front of plaintiff's business. Further, the trial court found that the easement was not limited by reference to the curb-cut, but that the curb-cut was used only to describe the location of the easement.

On appeal, defendants argue that (1) the trial court improperly decided the case under MCR 2.116(I)(2) because it made its decision on an issue not before the court; (2) the easement was for a particular purpose that ceased with the end of the curb-cut in the 1992 street-scape project; (3) the DDA did not have authority to grant the easement; and (4) plaintiff, a private individual, is prohibited from owning a property interest in a public street.

We review de novo a trial court's decision on a motion for summary disposition. *General Motors Corp v Dep't of Treasury*, 466 Mich 231, 236; 644 NW2d 734 (2002).

We first address the issue of whether the trial court granted summary disposition improperly under MCR 2.116(I)(2) on an issue not before the court. A trial court properly grants summary disposition to an opposing party under MCR 2.116(I)(2) if the court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law. *Washburn v Michailoff*, 240 Mich App 669, 672; 613 NW2d 405 (2000).

Defendants argue that because the issue raised was whether the easement unambiguously referred to the curb-cut as the only easement, the trial court should have never considered the question whether the easement unambiguously referred to the parking area as the easement. We disagree with defendants. Defendants raised the issue of the interpretation of the language in the easement relating to its scope. This required the trial court to read the entire easement, and determine if the scope was clearly stated. Moreover, in its response brief below, plaintiff asserted, in her argument on this point, that, "Indeed, if the deed is unambiguous, it is unambiguous in plaintiff's favor, in that it states that vehicles on Middle Street will not block the plaintiff's ingress and egress rights." Further, to properly interpret the agreement and determine if ambiguity existed, the trial court had to read the entire agreement, and not limit its reading to the portion emphasized by defendants. When construing the meaning of a contract, the contract is read as a whole. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000).

Second, defendants argue that once the curb-cut was changed, the purpose of the easement no longer existed. We disagree. Initially, we find that the easement does not contain language making it an easement for a particular purpose. "The language used to indicate such a restriction [an easement for a particular purpose only] is specific." *Odoi v White* 342 Mich 573, 575-576; 70 NW2d 709 (1955). For example, *MacLeod v Hamilton*, 254 Mich 653, 656; 236 NW 912 (1931) reveals specific limiting language creating an easement for a particular purpose when the easement was "for the construction of said water course, ditch or drain and *for no other purpose whatever* …" (Emphasis added.) Also, defeasance language, such as that found in *Hickox v Chicago & C S R Co*, 78 Mich 615, 617; 44 NW 143 (1889) (if the railway "should cease to be used and operated as a railroad, … the right of way granted thereunder *shall terminate*" (emphasis added)), creates an easement for a particular purpose. No such language exists in the easement in the present case. Moreover, even if this were an easement for a particular purpose, the change in the curb-cut is not sufficient to make the easement impossible, as it is only make the easement slightly more difficult to use. See *MacLeod*, *supra;* and *Andersen v Schmidt*, 16 Mich App 633; 168 NW2d 437 (1969) (where the purpose of the easement ceased to exist).

Third, defendants argue that the DDA did not have authority to grant the easement, and that the Village has the sole authority over its public streets. Defendants cite Const 1963 art 7, § 29, which states that "the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys, and public places is hereby reserved to such local units of government." Defendants also cite MCL 67.7, which provides in relevant part: "The [village] council shall have the supervision and control of all public highways, bridges, streets, avenues, alleys, sidewalks, and public grounds within the village," and MCL 67.23 which provides in relevant part: "The council may regulate the use of public highways, streets, avenues, and alleys of the village, subject to the right of travel and passage therein."

Defendants provide citation for the Village's authority, but fail to provide any evidence that the council and the DDA were not acting together, or that the DDA was acting without proper authority from the Village in selling the property to plaintiff with the easement included. Further, the Village enforced the no parking area for ten years before filing this suit, apparently acknowledging the validity of the easement. More important is the fact that under the scheme articulated in the downtown development authority act, MCL 125.1651, *et seq.*, the DDA is clearly an arm of the Village such that its act in conveying the easement should be deemed to be the act of the Village. It is noted that MCL 125.1652, MCL 125.1653 and MCL 125.1653b permit a municipality to establish a downtown development authority. MCL 125.1654 provides that the "authority shall be under the supervision and control of a board consisting of the chief executive officer of the municipality" and from 8 to 12 members "determined by the governing body of the municipality." The preamble to the downtown development authority act states that one purpose of the act is "to authorize the acquisition and disposal of interests in real and personal property." Furthermore, under the caption "Legislative findings," MCL 125.1651a(h) states,

> That the provisions of this act are enacted to provide a means for local units of government to eliminate property value deterioration and to promote economic growth in the communities served by those local units of government.

In light of the above, it seems clear that the DDA was acting as an extension of the Village when it deeded the property to plaintiff and her husband, granting the easement in question, as it was exercising its duty to promote general growth and development in the community.[1] See MCL 125.1651a(h); MCL 125.1653.

Finally, defendants argue that under *Village of Grosse Pointe Shores v Ayres*, 254 Mich 58; 235 NW 829 (1931), that the DDA had no right to "barter away" the easement in a public street. However, the facts in *Ayres, supra*, differ substantially from those in the case at bar, and therefore we disagree with defendants.

In *Ayres*, *supra*, private citizens conveyed and dedicated land to the village for a road. Some of the citizens used forms drafted by the village, and Ayres used a form drafted by his attorney. *Id*. at 60. The village council accepted all of the dedications unconditionally by resolution. *Id*. Ayres' deed contained a number of restrictions on the use of the property conveyed and included a provision which would revert the property back to Ayres if any of the provisions and restrictions in the deed were violated. *Id*. at 60-61. Our Supreme Court determined that:

> A condition in a deed of dedication prohibiting the uses above stated or circumscribing the future freedom of action of the authorities to devote the street to the wants and convenience of the public is void, as against public policy or as inconsistent with the grant. And where the condition in the dedication for a street is void as against public policy or as inconsistent with the grant, the dedication is effective, but the condition is inoperative. [*Id.* at 64.]

The present case differs from *Ayres, supra,* because it does not involve a deed of dedication. The deed in the present case is not one where a private citizen attaches conditions to a conveyance to the village. Rather, the Village, via the DDA, attached the conditions in the easement on its own accord, and for which the Village received valuable consideration.

Thus, we find *Ayres, supra,* distinguishable. Further, we conclude that any "inconvenience to the public" suffered for the lack these two parking spaces, is outweighed by the benefit to the public of being able to rely upon government entities honoring contractual obligations to residents.

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[1] We note that the authority cited by defendants is the same authority that supports that the Village can authorize the DDA to grant easements such as the one in the present case. Although the downtown development authority statute was not cited below, the issue of whether the Village was bound by the easement granted by the DDA was raised below and is therefore properly raised here.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Christopher M. Murray